

The principle of *ultima ratio* and the real need for criminal law measures at EU level

Seminar on Criminal Law | Brussels | 3 November 2014

European Parliament | Unit for Justice and Civil Liberties of the Legal Service in collaboration with the Professional Training Unit

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Introduction | *Ultima ratio*?

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debate so far

- extremely dogmatic
- leaving no room for ancillary functions of harmonization of substantive criminal law
- trying to ground it in EU law (below references)
- often fuzzily linking *ultima ratio* to

necessity | in the sense of Article 82(2) TFEU ('to the extent necessary to facilitate ... having a cross-border dimension')? | in the sense of Article 83(2) TFEU ('essential to ensure effective implementation of a Union policy ...') | quid trending extension to MR? (no reference in Article 82(1) TFEU) | awareness of MR as the 'lesser evil'?

proportionality (suitability, necessity, proportionality *stricto sensu*) | in the sense of Article 49(3) Charter? | quid administrative offences and administrative sanctions? | quid trending (distrust-based) calls for proportionality or merits tests, fundamental/constitutional rights or *ordre public* exceptions in MR?

subsidiarity | in the sense of Article 5 TEU? (including proportionality) | quid national sovereignty, self-centeredness & contradictory effects

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Substantive criminal law

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autonomous function of approximation

- special part: *ultima ratio* often overstepped | examples (+ inflatable organized crime notion)
 - where respected, often *de jure* eroded by EU ability to only set minima
 - maximal offence scope & maximum sanction (or maximal maximum sanction)? | hindered by subsidiarity and historical choice for MR as the lesser evil
 - where respected, often *de facto* eroded by (wider) national criminalization
 - prompting perverse effects | dual criminality bubble in MR | MS' self-centeredness
- general principles
 - jurisdiction to prescribe | often creating potential conflicts of jurisdiction
 - needs: minimum concept 'participation' and 'liability of legal persons'

ancillary functions of approximation | often neglected though needed

- facilitating MR & judicial cooperation
 - vs incoherent dual criminality abolishment
- defining EU (priority) crimes
- enabling EU crime statistics (jointly identified offence parts)
- facilitation ECRIS offences
- demarcation (stronger) mandates EU bodies & agencies
 - subsidiarity best served through limitation EU-worthiness or –eligibility

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Procedural criminal law | MR & judicial cooperation

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putting the carriage before the horse (no trust)

confusing carriage racing and jumping (cross-border dimension)

From lesser evil to Trojan Horse? (fundamental rights)

Procedural Roadmap bubble & distrust shifting

real needs

- halt Azerbaijan contradiction
- halt legitimization discriminatory approaches
- halt *forum regit actum* & one-directionality
- halt remedies/safeguards/judicial validation procedures as new defences
- EU minimum standards investigative measures (evidence admissibility)
- MR of procedural guarantees | best of both worlds | *lex mitior*
- reintroduce dual criminality | limit MR to jointly identified offence parts (EULOCS)
- establish EU policy for disqualifications in criminal matters

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Broader criminal policy needs

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do away with vast amount of incoherences

drop distinction judicial and law enforcement cooperation

fundamental debate on administrative/criminal character offences and sanctions (Engel criteria)

ECRIS-extensions | legal persons, TCN, Europol/Eurojust connectivity, legal effect inclusion following notification (Fourniret?), limited introduction EU-certificates of non-prior conviction

establishment of EPRIS

introduce (aut exequi aut tolerare) principle (Article 89 TFEU)

- physical border-crossing possibility in view of active investigation while respecting local legislation and/or agreed EU minimum procedural guarantees

establishment of double generic severity rankings

- sanctions (+ combining nature & duration)
- sanction execution modalities (idem)

utilise EULOCs as official benchmark (infra)

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The EU Level Offence Classification System

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bench-mark for enhanced internal coherence of the EU's criminal policy

- including in the area of criminal records infoex

improved ECRIS classification

- exclusive categories
- incorporating/centered around EU approximation acquis
 - clustering of common denominator underneath “jointly identified parts of offences”
 - i.e. much wider acquis than 32 MR list, for which dual criminality test can be omitted
 - i.e. joint acquis = trust-building
 - = also tool for delineating Europol/Eurojust access (mandated offences incorporated)
- including definitions (usually from binding EU acquis) for interpretability in application FD 2008/675/JHA

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EULOCS illustrated

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0906 00	MONEY LAUNDERING
0906 01	Offences jointly identified as Money Laundering
0906 01 01	The conversion or transfer of property
0906 01 02	The illicit concealment or disguise of property related information
0906 01 03	The illicit acquisition, possession or use of laundered property
0906 02	Other forms of Money Laundering

0201 00	OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION
0201 01	Directing a criminal organisation
Article 2 (b) , Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.

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0100 00 Open Category	CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT
0101 00	GENOCIDE
0102 00	CRIMES AGAINST HUMANITY
0103 00	WAR CRIMES
0104 00	CRIMES OF AGGRESSION
0200 00 Open Category	PARTICIPATION IN A CRIMINAL ORGANISATION
0201 00	OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION
0201 01	Directing a criminal organisation
0201 02	Knowingly participating in the criminal activities, <i>without being a director</i>
0201 03	Knowingly taking part in the non- criminal activities of a criminal organisation, <i>without being a director</i>
0202 00	OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION
0300 00 Open Category	OFFENCES LINKED TO TERRORISM
0301 00	PARTICIPATION IN A TERRORIST GROUP
0301 01	Offences jointly identified as participation in a terrorist group
0301 01 01	Directing a terrorist group
0301 01 02	Knowingly participating in the activities of a terrorist group, without being a director
0301 02	Other forms of participation in a terrorist group
0302 00	OFFENCES LINKED TO TERRORIST ACTIVITIES
0302 01	Offences jointly identified as linked to terrorist activities
0302 01 01	Public provocation to commit a terrorist offence
0302 01 02	Recruitment for terrorism
0302 01 03	Training for terrorism
0302 01 04	Aggravated theft with the view of committing a terrorist offence
0302 01 05	Extortion with the view of committing a terrorist offence
0302 01 06	Drawing up false administrative documents with the view of committing a terrorist offence
0302 01 07	Financing of terrorism
0302 02	Other offences linked to terrorist activities
0303 00	TERRORIST OFFENCES
0303 00	Offences jointly identified as terrorist offences
0303 01	Terrorist attacks upon a person's life
0303 02	Terrorist attacks upon a person's physical integrity
0303 03	Terrorist kidnapping or hostage taking
0303 04	Causing extensive terrorist destruction
0303 05	Terrorist seizure of transport
0303 06	Terrorist activities related to weapons
0303 07	Terrorist release of dangerous substances, or causing fires, floods or explosions

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EULOCS.

The EU level offence
classification system

A bench-mark
for enhanced
internal
coherence of the
EU's criminal
policy

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W. De Bondt

Principal

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Cross-border execution of judgements involving deprivation of liberty in the EU

Overcoming legal and practical problems through flanking measures

Gert Vermeulen
Anton van Kalmthout
Neil Paterson
Marije Knapen
Peter Verbeke
Wendy De Bondt

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Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States

Gert Vermeulen
Anton van Kalmthout
Neil Paterson
Marije Knapen
Peter Verbeke

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Rethinking international cooperation in criminal matters in the EU

Moving beyond
actors, bringing
logic back, footed
in reality

Gert Vermeulen
Wendy De Bondt
Charlotte Ryckman
(eds.)

Principal
European Commission
DG Justice
(JLS/2009/JPEN/PR/0028/E4)

FREE GATHERING AND MOVEMENT OF EVIDENCE IN CRIMINAL MATTERS IN THE EU

Thinking beyond borders,
striving for balance,
in search of coherence

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Liability of legal persons for offences in the EU

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W. De Bondt
C. Ryckman

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The disqualification triad

Approximating
legislation
Executing requests
Ensuring equivalence

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Charlotte Ryckman
Nina Peršak

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Questions and discussion

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